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**SUPREME COURT OF THE UNITED STATES**

**OCTOBER TERM, 1943**

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**No. 558**

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**SEA GULL LUBRICANTS, INC.,**  
*Petitioner,*

*vs.*

**THE UNITED STATES.**

---

**PETITION FOR A WRIT OF CERTIORARI TO THE  
COURT OF CLAIMS.**

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**ASHLEY M. VAN DUZER,  
PETER REED,  
ORRIN B. WERNTZ,**  
*Counsel for Petitioner.*



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*To the Honorable, the Chief Justice and Associate Justices  
of the Supreme Court of the United States:*

Your petitioner, Sea Gull Lubricants, Inc., prays that a writ of certiorari issue to review the judgment of the Court of Claims of the United States entered in the above entitled cause on June 7, 1943, in favor of respondent.

**Opinion Below.**

The opinion of the Court of Claims (R. 33) is reported in 99 C. Cl. 716 and in 50 Fed. Supp. 230.

**Jurisdiction.**

The judgment of the Court of Claims (R. 37) was entered on June 7, 1943. Motion for rehearing and for a

new trial (R. 37) was filed by petitioner on August 3, 1943, which motion was overruled (R. 37) on October 4, 1943. This petition was filed in this Court on or before January 4, 1944 (see Clerk's file mark). The jurisdiction of this Court rests on Sections 288 and 350 of the Judicial Code.

### **Statutes and Regulations Involved.**

The pertinent parts of the Statutes and Regulations involved are set forth in the Appendix (*Infra*, pp. 15 and 16).

### **Statement.**

The question presented by this petition is whether Section 601 (c) of the Revenue Act of 1932, reading:

“There is hereby imposed upon the following articles sold in the United States \* \* \* a tax at the rates hereinafter set forth \* \* \*:

(1) Lubricating oils, 4 cents a gallon; \* \* \*.”

applies to cutting fluids which are allowed to flow upon metal being cut in commercial machine tool operations.

Except for the ultimate finding of taxability, i. e., that the function performed by the fluids is lubrication and that they were thus lubricating oils (R. 33), petitioner accepts without reservation the findings of fact entered by the Court of Claims and made part of its judgment.

### **Facts.**

Petitioner, a manufacturer and producer of cutting fluids, sold them through a subsidiary selling company to The National Acme Company and The Lamson & Sessions Company. Petitioner paid the taxes and separately invoiced the amount to Acme and Lamson, which each reimbursed petitioner. There are no procedural problems incident to passing on of the tax. The compound bought by Acme was

“Elaine Oil”, a commercial form of oleic acid, a fatty acid derived from lard oil (R. 27). Lamson purchased “Clark’s X Cutting Oil”, a mineral-base cutting fluid compounded from mineral oil, animal fat, sulphur and chlorine (R. 27): Acme used the Elaine Oil in combination with chlorine and sulphur (R. 27). The cutting fluids ordinarily used in commercial machine tool operations are combinations of fatty oil, mineral oil, soluble oil, soap, soda, sulphur, chlorine, aliphatic compounds, phosphoric esters and water (R. 30).

### **Petitioner’s Claim.**

(1) The fluids were not “lubricating oil” under the statute or regulations.\*

The point turns on whether cutting fluids perform a lubricating function in connection with machining metal, the Commissioner of Internal Revenue having since 1932 uniformly exempted oils capable of, but admittedly not used for, lubrication.

### **Summary of the Findings of the Court of Claims.**

In its essentials the Court’s findings may be summarized as follows:

(1) Claim for refund, asserting the same grounds of recovery as here, was filed and rejected by the Commissioner (R. 25-27).

(2) The fluids in each instance were used as cutting fluids in automatic screw machine operations. Both in the case of Acme and Lamson, the automatic screw machines were provided with separate lubricating oil systems in which entirely different oils (the tax on which has never been in controversy) were stored and circulated to lubricate the machines (R. 27-28). Every

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\*A constitutional point was made but is not presented here, the Court’s findings not being adequate to admit of its consideration.

effort is made to exclude the cutting oil from the bearing surfaces, which are sealed off so far as possible because cutting oil damages the bearings by corrosion and otherwise (R. 27-28). The cutting fluids are applied by flooding them over the work at and surrounding the point of the cut. The flooding is ordinarily achieved by having jets of oil directed at the cutting area in a continuous stream of from 10 to 80 gallons per minute (R. 31). The cutting is accomplished by plastic deformation of the crystals in the metal being cut under extreme pressure and at high temperatures. The operation is not in the nature of a splitting and there is no crack or opening ahead of the point of the tool (R. 30). Within the cutting area there are no cracks or space other than of molecular dimensions in terms of millionths of an inch and in the area where the cutting takes place pressures of from 100,000 to 300,000 pounds per square inch and temperatures of 800° to 1200° Fahrenheit exist. Oil in fluid form will not withstand such pressures and temperatures except possibly momentarily (R. 30-31). A pressure of 1,000 pounds per square inch is an extremely heavy load for lubricating oil films, and the temperature destruction point of an oil film is less than the minimum temperature limits involved.

(3) The functions served by the cutting oils are (1) to cool the work piece and the tool, (2) to serve as an anti-weld or anti-seizure substance whereby friction is reduced between the work piece and the tool and the chip and the tool, (3) to wash away the chips, and (4) to prevent rust (R. 31).

(4) The pertinent mechanics of metal cutting are that metal surfaces, including that of the work piece and of the tool, are normally covered with adsorbed films<sup>1</sup> of molecular thickness. Were this not true and were the metal surfaces chemically clean, i. e. nascent, they would weld together immediately upon being

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<sup>1</sup> I.e., an attribute of or integral part of.

placed in contact. As the cutting operation continues both surfaces are robbed of the adsorbed film. Thus, there is a tendency to weld or seize. The cutting fluids carry additives (such as sulphur or chlorine) and these additives, *the fluid or oil being a mere carrier*,<sup>2</sup> set up chemical reactions which restore the adsorbed film and prevent this welding or seizure. Ordinary mineral lubricating oils such as are used in fluid film lubrication are not generally satisfactory as cutting oils, and similarly, cutting oils are not generally satisfactory for lubricating moving parts of machinery (R. 31-32).

(5) "The commonly understood conception of lubrication is that which takes place when a film of oil is interposed between adjacent and relatively moving parts with the result that there is actual prevention of contact between the opposing surfaces, thus eliminating or reducing frictional resistance". This, in its simplest form, may be illustrated by ordinary journal and bearing lubrication. Such lubrication is almost, if not entirely, mechanical or physical (R. 28).

(6) Whatever physical or mechanical action, that is, fluid film lubrication takes place, if any, is of a minor or incidental character (R. 32).

### **Question Presented.**

(1) Are the cutting fluids as above described and performing the function above set forth "lubricating oil" within the meaning of Section 601 (c) of the Revenue Act of 1932, and the Regulations thereunder?

### **Specification of Errors to Be Urged.**

The Court of Claims erred:

(1) In deciding and determining that Section 601 (c) of the Revenue Act of 1932 applied to and rendered taxable cutting fluids above described.

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<sup>2</sup> All emphasis is supplied by counsel.

## Reasons Relied On for the Allowance of the Writ.

### I.

*The decision of the Court of Claims conflicts with the controlling principles applied in decisions of this Court.*

*Old Colony R. R. Co. v. Commissioner*, 284 U. S. 552;

*DeGanay v. Lederer*, 250 U. S. 376;

*Lynch v. Alworth-Stephens Co.*, 267 U. S. 364;

*Caminetti v. U. S.*, 242 U. S. 470;

*U. S. v. First National Bank*, 234 U. S. 245;

*Edwards v. Slocum*, 264 U. S. 61;

*Maillard v. Lawrence*, 16 How. (57 U. S.) 251;

*White v. Aronson*, 302 U. S. 16;

*McCaughn v. Hershey Chocolate Co.*, 283 U. S. 489.

### II.

*The Court of Claims has decided an important question of general law in an untenable way and in conflict with the weight of authority.*

Here petitioner relies on the cases above cited as well as

*Mennen Co. v. Kelley* (C. C. A. 3rd), 137 Fed. (2) 866;

*Philadelphia Storage Battery Co. v. Lederer* (D. C. Pa.), 21 Fed. (2) 320;

*Feitler v. Harrison*, 126 Fed. (2) 449 (C. C. A. 7th);

*American LaFrance Fire Engine Co. v. Riordan* (C. C. A. 2nd), 6 Fed. (2) 964.

The Court of Claims found that the cutting fluids served four distinct functions; to cool the work; to serve as an anti-weld or anti-seizure substance; to wash away the chips; and to prevent rust (R. 31).

Only the anti-seizure function requires discussion. The Court has found (R. 31-32) that the prevention of welding is accomplished as follows: Metal surfaces are normally covered with films of molecular thickness, i. e. adsorbed

films. As the metal is ruptured, nascent, that is, chemically clean metal is exposed. The nascent surface of the work piece robs the tool of its adsorbed film and these two chemically clean surfaces come into contact. The tendency of such surfaces is to seize or weld. The additives in the cutting fluids set up a chemical reaction which replaces either constantly or intermittently the adsorbed films by new compounds, such as oxides or chlorides, having a shear strength less than the metal being cut. This reaction takes place at the very point of cutting, where high pressures and temperatures prevail. The temperatures are so high, i. e. 800 to 1200 degrees Fahrenheit, that fluid oil films will not withstand them (R. 31). Similarly pressures are so great, i. e. 100,000 to 300,000 pounds per square inch, that an oil film would break down. A pressure of 1,000 pounds per square inch is considered an extremely heavy load for a film of oil (R. 31). The Court specifically refused to find that there is lubrication in a mechanical sense, saying,

“Whatever physical or mechanical action, that is, fluid film lubrication, takes place, *if any*, is of a minor or incidental character, occurring only at the beginning of the operation, or at points some distance from the point of the tool” (R. 32).

The Court specifically finds that the fluids do not themselves accomplish the chemical function. That is accomplished by the additives, i. e. sulphur or chlorine in most instances, and the oil is only a carrier (R. 32):

Petitioner's point is that this chemical function cannot successfully be claimed to be lubrication.

(a) *The Statute, Committee Reports and the Regulations.*

The statute can be left with the mere statement that nothing in it aids in determining the scope which Congress intended to give to the words “lubricating oil”. It is thus

fair to assume that Congress intended those words in their ordinary and not a strained sense.

The proceedings of the Congressional Committee strongly suggest that the statute was intended to apply only to lubrication as ordinarily understood. That resort may be had to those proceedings is indicated by *U. S. v. Monia*, 317 U. S. 424.

Congress was, in the main, enacting a counterpart of the gasoline tax and was thinking primarily in terms of motor oil. At one point the Bill contained a definition of viscosity ratings based on automobile oil usage, which was eliminated probably because the automobilist could evade the law by mixing oils of a viscosity higher and lower than those defined by the statutes. When the Bill was remanded to the House, Mr. Crisp of the Committee on Ways and Means submitted a report recommending its passage in which he stated that

“The grades of lubricating oil taxed at the rate of 4¢ a gallon are those suitable for use in an internal combustion engine.” (Internal Revenue Bulletin, C. B. 1939-1, Part 2, page 482).

See also H. R. 10236 (H. R. R. No. 708, 72nd Congress, First Session, Union Calendar No. 123).

The Regulations are important only because they show that the Commissioner has never adopted a clear, uniform and consistent rule for the taxation of lubricating oils. His first regulation, that of June 21, 1932 (See Appendix, p. 15 *infra*) probably contemplated taxation according to potential, rather than actual, use, but in less than two months, on July 16, 1932 the regulation was amended to exclude oils having both lubricating and non-lubricating uses if put into a channel of consumption or distribution for a non-lubricating use and under a name identifying it for such use (these conditions have been met in the

present case), and the manufacturer obtains a certificate of exemption. No certificates were secured in this case because the Commissioner refused to permit their use. (See Finding of Court of Claims, R. 26.)

In 1934 the regulations were simplified so as to include oils "sold as lubricating oils and all oils which are sold and used for lubrication."

The only informal ruling is Informal Ruling No. 78 of August 23, 1932, and its companion ST-505, XI-2, C. B. 448, 1932. These are merely sales tax rulings and do not have the force of law and are not entitled to more than passing consideration.

*Radiant Glass Co. v. Burnet*, 54 Fed. (2) 718 (Ct. App. D. C.);

*Pictorial Review Co. v. Helvering*, 68 Fed. (2) 766, 768 (Ct. App. D. C.);

*Helvering v. New York Trust Co.*, 292 U. S. 455, 468;

*Biddle v. Commissioner*, 302 U. S. 573.

The Commissioner himself states in his bulletins that such rulings are merely for the information of taxpayers and have none of the true force or effect of Treasury Decisions.

The Commissioner's literature is full of informal rulings, frequently inconsistent, dealing with slushing oil, crank case oil, refrigerator oil, fish oils, petrolatum, core oils, neatsfoot oil and dozens of others; e.g., grinding oils are not taxable, although grinding differs in no respect from any other metal cutting, and the Court of Claims so found (R. 29).

Thus, the Court of Claims was free to interpret the statute unaffected by any considerations of administrative interpretation, and it is to be noted that the Court did not seek so to place its reliance. *Burnett v. Chicago Portrait Co.*, 285 U. S. 1, 16, 20.

(b) *The Court of Claims disregarded the concept that statutory language should be given its ordinary meaning in the absence of indicia to the contrary.*

The Court of Claims accurately defined lubrication in its Findings (R. 28). It said:

“The commonly understood process of lubrication is what takes place when a film of oil is interposed between adjacent and relatively moving parts with the result that there is actual prevention of contact between the opposing surfaces, thus eliminating or reducing frictional resistance. In its simplest form, it is illustrated by the ordinary journal and bearing \* \* \*.”

This is not what takes place in metal cutting. The Court said in its Findings (R. 32):

“Whatever physical or mechanical action, that is, film lubrication, takes place, if any, is of a minor or incidental character, occurring only at the beginning of the operation, or at points some distance from the point of the tool.”

The Court of Claims accurately stated what takes place in a metal cutting operation. The Court excluded the formerly held belief that as the tool enters the work piece there is a splitting ahead of the point of the tool into which cutting fluids might penetrate (R. 30). It fully recognized that there was no crack or space other than of molecular dimensions in terms of millionths of an inch at or around the cutting area (R. 30). The Court also found that oil, as oil, could not withstand either the temperatures generated or the pressures exerted in the cutting area (R. 31). Then follows the finding that what takes place is a chemical restoration of molecular films which are parts of the tool and work piece respectively.

To characterize any such function as lubrication is to deny truth. A citizen has a right to know the objects

upon which he will be taxed, and it is within the power of Congress to define and describe at will, so long as constitutional limitations are not transcended. If Congress has not used words adequate to include cutting fluids, then it must inevitably be said that Congress did not intend that they should be taxed. No power to tax them was lacking. The ordinary citizen, when he thinks of lubrication, thinks not in terms of water solutions or compounds, performing a peculiar chemical function in molecular space, but rather of the film of oil in his automobile engine; his lawn mower; his wife's sewing machine; in the journals and bearings at the shop or factory where he works. Congress has used the words with which the ordinary citizen is familiar.

When this has been said, the entire lawsuit in this posture of the case has been stated.

The ultimate conclusion of the Court of Claims flies in the face of its Findings of Fact and is repugnant to them. Cf. Sec. 288 Judicial Code, 28 U. S. C. A. 3rd paragraph.

The decision of the Court of Claims immediately runs afoul of this Court's decisions, such as *Old Colony R. Co. v. Commissioner*, 284 U. S. 552, rejecting the Commissioner's contention that the word "interest" was used in the Revenue Laws in a technical sense rather than as rent for money, as the ordinary taxpayer understands the term; *DeGanay v. Lederer*, 250 U. S. 376, rejecting an alien taxpayer's argument that because he lived elsewhere than in the United States, his holdings here were not "property owned" in the United States; *Lynch v. Alworth-Stephens Co.*, 267 U. S. 364, rejecting the Commissioner's argument that a lessee's interest in mining property was not to be included within the word "property" for depletion purposes, this Court saying:

"And the plain, obvious and rational meaning of a statute is always to be preferred to any curious, nar-

row, hidden sense that nothing but the exigency of a hard case and the ingenuity and study of an acute and powerful intellect would discover."

Cf. Mr. Chief Justice Holmes, in *Edwards v. Slocum*, 264 U. S. 61;

"\* \* \* 'algebraic formulae are not lightly to be imputed to legislators' \* \* \*."

Taxation deals necessarily with realities and not with fine-spun theories. *Helvering v. Hallock*, 309 U. S. 106. Thus, shawls are "wearing apparel" even though they may be used as throws for pianos. *Maillard v. Lawrence*, 16 How. (57 U. S.) 251.

When a taxpayer asked this Court to define candy in an excise tax case as not including sweet milk chocolate, this Court felt that to agree would do violence to common sense. *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 489.

Other illustrations of the application of this well-known rule of statutory construction are to be found in *Mennen Co. v. Kelley*, 137 Fed. (2) 866 (C. C. A. 3rd); *White v. Aronson*, 302 U. S. 16, in which this Court decided that jig saw picture puzzles were not taxable as games; *Philadelphia Storage Battery Co. v. Lederer*, 21 Fed. (2) 320, 321, 322; *Feitler v. Harrison*, 126 Fed. (2) 449 (C. C. A. 7th); and *American LaFrance Fire Engine Co. v. Riordan*, 6 Fed. (2) 964 (C. C. A. 2nd).

These considerations should find complete acceptance where the sovereign is dealing with the citizen in tax matters. Considerations of governmental grace then enter into the problem. So stated this Court in *Eidman v. Martinez*, 184 U. S. 583, where it was said that it is an old and familiar rule applicable to all forms of taxation and "particularly special taxes" that the sovereign is bound to express its own intention to tax in clear and unambiguous language.

(c) *Presumption if the statute is ambiguous.*

The decision of the Court of Claims likewise ignores the ordinary rule that where ambiguities exist, they should be resolved in favor of the taxpayer. *Gould v. Gould*, 245 U. S. 151, at p. 153, and *Old Colony R. R. Co. v. Commissioner*, *supra*. Perhaps there has been too widespread a reliance upon the rule stated as above. (Cf. *White v. U. S.*, 305 U. S. 281, a case, however, dealing with an exception to or exemption from the tax).

The principle is sound, however, and as respects this case may be stated thus: Congress in an excise tax law has it within its power to select language fairly describing the article with respect to which the tax is to be applied. If Congress fails to perform that function, then clearly, to the extent that presumptions or inferences must be brought into play, none should be indulged to extend congressional language to anything which it does not cover.

(d) *Minor and Incidental Character of Alleged Lubrication Function.*

In no aspect is the alleged lubricating function sufficient quantitatively to warrant taxability. The Court has found that cutting fluids are poured upon the work by flooding the work in a continuous stream of from 10 to 80 gallons per minute (R. 31). The Court has also found that what causes the chemical action is the additives, i. e. chlorine, sulphur, etc., in the fluid. The oil is but a carrier. Admittedly only the tiniest amount of the compound can function as an anti-weld. Obviously, the huge amounts of the fluid poured upon the work are for purposes of cooling, washing away chips, etc. Under these circumstances it seems entirely reasonable that taxability should be determined by the chief use rather than by infinitesimal use, even if, contrary to fact, it be deemed a lubricating use. It is of no importance that an understanding of what cutting fluids

actually accomplish is comparatively new to those engaged in the metal cutting business, and that some have advertised their products as lubricants. The taxability of the product is not to be determined by the innocent misrepresentations of the seller. Cf. *Benziger v. U. S.*, 192 U. S. 38.

### Conclusion.

The Court, we submit, decided the case in a way not in accord with the applicable decisions of this Court, and in a way untenable and in conflict with the weight of authority. See Rule 38-5 of this Court.

That the case is of importance is not open to doubt. Its decision by this Court would serve as a guide to the entire industry. Its outcome is of importance to all users of cutting fluids.

There is no dispute of fact and the legal questions are clear-cut. It is submitted that the case is one which warrants admission to this Court for hearing upon the general docket.

Respectfully submitted,

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*Attorneys for Petitioner.*





## APPENDIX.

### *Section 601 (c) of the Revenue Act of 1932:*

“There is hereby imposed upon the following articles sold in the United States by the manufacturer or producer or imported to the United States a tax at the rates hereinafter set forth to be paid by the manufacturer, producer or importer:

(1) Lubricating oils, 4 cents a gallon; \* \* \*.”

### *Article 11 of Regulations 44, effective June 21, 1932:*

“Scope of tax. The tax attaches to all sales of oil of any type commonly or commercially known as lubricating oil or commonly used for lubricating purposes, regardless of the degree to which it has been refined, its range of viscosity, the manner in which the finished commodity has been produced, the material from which manufactured or with which combined, or the purpose for which it is to be sold or used by the vendee. Ordinarily the term ‘lubricating oils’ will be understood not to include a product of the type commonly known as grease.”

### *Article 11 of Regulations 44, as amended on July 16, 1932:*

“‘Lubricating oils’ are all oils sold as such and all oils sold or used for lubrication. A particular oil having both lubricating and non-lubricating uses is taxable unless (1) it is put into a channel of consumption or distribution for a use other than that of lubrication, under a name identifying it for such use, and (2) the manufacturer obtains from the purchaser a certificate to the effect that the oil will be used by the purchaser for a stated purpose other than that of lubrication or resold by him. \* \* \*.”

“Examples of oils not subject to tax when sold (otherwise than as lubricating oil) for purposes other than lubrication, as prescribed in preceding paragraph, are: road oil, cordage oil, agricultural spray oil, cotton

softener oil, ink oil, medicinal white oil and oil used as a component material in the manufacture of non-taxable oils, paints, insecticides, soap stock, grease, etc.

“The term ‘lubricating oil’ does not include products of the type commonly known as grease. Oleaginous substances are classed as grease and not subject to the tax only if (1) of a work consistency of less than 390 penetration units or a non-work consistency of less than 360 penetration units by the method of test of the American Society for Testing Materials D21727T and (2) free from oil or comprising oil and a soap or a mixture of soap or of soap and other substances.” (T. D. 4339).

*Article 11 of Regulations 44, as amended in 1934:*

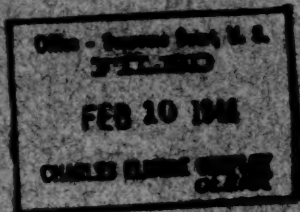
“Use of term. Term ‘lubricating oil’ as used in these regulations includes all oils, regardless of their origin, which are sold as lubricating oils and all oils which are sold or used for lubrication.”

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*In the Supreme Court of the United States*

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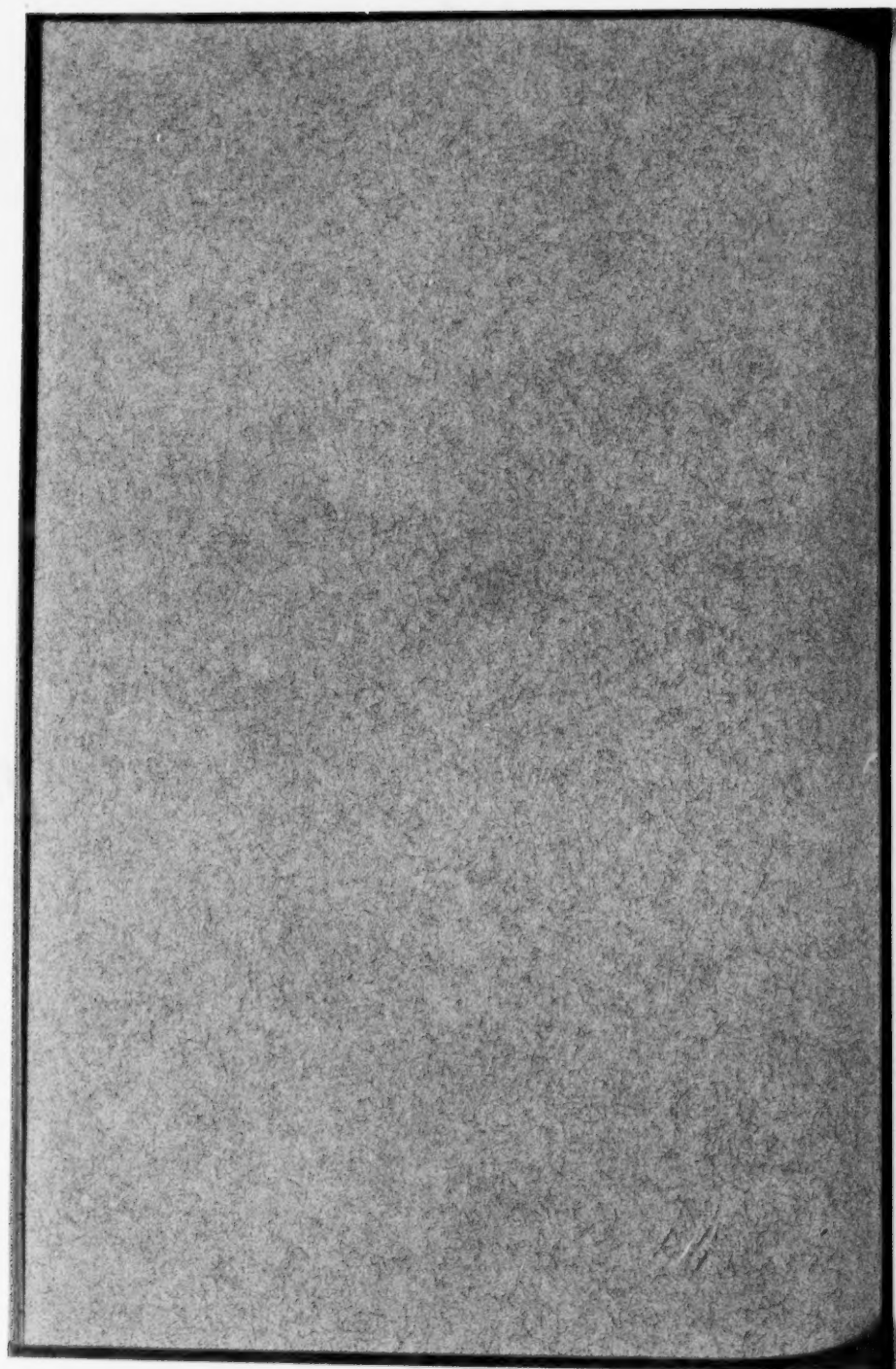
ON PETITION FOR A WRIT OF CERTIORARI  
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BRIEF FOR THE UNITED STATES IN OPPOSITION

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**BRIEF FOR THE UNITED STATES IN OPPOSITION**

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## **OPINION BELOW**

The opinion of the court below (R. 33-37) is reported at 99 C. Cl. 716 and 50 F. Supp. 230.

## **JURISDICTION**

The judgment of the Court of Claims was entered June 7, 1943 (R. 37). On August 3, 1943, the taxpayer filed a motion for a new trial which was overruled on October 4, 1943 (R. 37). Petition for a writ of certiorari was filed December 27, 1943. The jurisdiction of this Court is invoked under Section 3 (b) of the Act of February 13, 1925, as amended by the Act of May 22, 1939.

## QUESTION PRESENTED

Whether certain oils sold by the taxpayer and used in the machining of metals are "lubricating oils" and hence subject to the tax imposed by Section 601 (c) of the Revenue Act of 1932.

## STATUTES AND REGULATIONS INVOLVED

The pertinent portions of the applicable statutes and regulations are set forth in the Appendix, *infra*, pp. 10-13.

## STATEMENT

The special findings of fact of the Court of Claims (R. 23-33) may be summarized as follows:

Petitioner, a corporation engaged in the manufacture and sale of oils used in metal cutting, sold to its subsidiary, the Clark Oil Company, during the period June 1935 to November 1938, certain oils known as "Elaine Oil" and "Clark's X Cutting Oil" (R. 23).<sup>1</sup>

These oils are commonly known as "cutting oils;" the "Elaine Oil" is a fatty acid derived from lard oil; "Clark's X Cutting Oil" is compounded by adding sulphur and chlorine together with animal fat to a mineral oil base (R. 27). In machining of metals cutting oil is applied under

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<sup>1</sup> Appropriate agreements have been entered into between the plaintiff and the ultimate vendees to whom petitioner's subsidiary sold the oil under which it was agreed that the petitioner should file and prosecute a claim for refund and that any credit or refund resulting therefrom should inure to the benefit of the vendees. Consent to this procedure has also been obtained from the Clark Oil Company. (R. 25.)

pressure to the workpiece and the cutting tool through jets directed at the area where the cutting occurs. The jets are opened immediately before the cutting begins and the oil continues to drench the work and the tool throughout the entire operation. Dependent upon the type of work, the quantity of oil ejected varies from 10 to 80 gallons per minute. (R. 31.)

The functions served by the cutting oils are: (1) to cool the workpiece, thereby preventing distortion, and cool the tool, thereby increasing its life; (2) to serve as an anti-weld or anti-seizure substance whereby friction is reduced between the workpiece and the tool, and the chip and the tool; (3) to wash away the chips or cuttings; and (4) to prevent rust and corrosion (R. 31).

The second of these functions of cutting oils, that of serving as an anti-weld or anti-seizure substance, is recognized as one of the important primary functions of cutting oils. This function may be technically described as follows: Metal surfaces are normally covered with films, of molecular thickness, which are sometimes referred to as "adsorbed films." Both the surface of the tool and the surface of the workpiece are covered with this film before the cutting operation begins. Freshly ruptured metal is in a nascent or chemically clean state, and any nascent surface, because of its unsatisfied molecules, is in an extremely active condition. As the cutting operation advances, the surface of the tool encounters the

nascent surface of the workpiece which, because of its active condition, progressively robs the surface of the tool of its adsorbed film, thus tending to produce another nascent surface. When two such surfaces come in contact, adhesion or seizure develops, as it is the normal reaction for two chemically clean surfaces to weld or seize and build up frictional resistance. The cutting fluid prevents such seizure or welding and reduces or relieves the resulting friction. (R. 31-32.)

The pressure between the tool and the workpiece is high, as are the temperatures generated. Mineral oil alone will not withstand such pressures and temperatures, except possibly momentarily. (R. 31.) However, in the use of cutting oils, the sulphur and chlorine additives exert their influence when the pressures or temperatures decompose the mineral base oil, through a chemical reaction with the chip metal and tool face, and thus the adsorbed film is restored or supplied through the formation of new compounds such as iron oxides or iron chlorides having a shear strength less than that of the metal which is being cut (R. 32).

The above type of lubrication is generally recognized in the lubricating field as "extreme pressure lubrication." This type of lubrication is used in the hypoid differential gears of automobiles, where high pressures prevail. (R. 29.)

In a broad general sense a lubricant is any material which tends to reduce friction between moving parts. This, in substance, is the dictionary definition of lubricant, which definition also includes "a cutting lubricant." In its simplest form lubrication operates hydrodynamically through the injection of a fluid film of oil between two relatively moving parts to prevent metal to metal contact. This type of lubrication is almost, if not entirely, mechanical or physical, rather than the result of chemical reaction as in the case of extreme pressure lubrication. (R. 28-29.)

Many large manufacturers of cutting oil advertise their products as "lubricants" and described their lubricating qualities. In some instances these manufacturers indicate that their cutting oils lubricate by fluid film lubrication, and others explain the operation of their products by analogy to extreme pressure lubricants. (R. 32-33.)

For the period June 1935 to December 1938, both inclusive, petitioner duly filed excise tax returns covering its sales of oil to ultimate consumers, including the sales of the "Elaine Oil" and "Clark X Cutting Oil," and paid the tax shown due thereon which was computed at four cents a gallon, the rate of tax provided in the revenue statutes as a tax on lubricating oils (R. 23-25). Claim for refund of the taxes paid on the last two oils mentioned was duly filed and was

rejected by the Commissioner of Internal Revenue on October 19, 1939 (R. 25-27). The petition in the Court of Claims was filed February 13, 1940 (R. 1).

Upon the foregoing facts the court below held that petitioner was not entitled to recover the taxes so paid and dismissed the petition, rendering judgment in favor of the United States (R. 33).

#### ARGUMENT

The only question in this case is whether the oils manufactured and sold by the petitioner are lubricating oils within the meaning of Section 601 of the Revenue Act of 1932 (Appendix, *infra*, p. 10). The term "lubricating oils" is not defined in the statute. Article 40 of Treasury Regulations 44 (Appendix, *infra*, pp. 11-12) provides that the term "lubricating oils" includes all oils which are sold as lubricating oils and all oils which are sold or used for lubrication. The regulation is not materially different from Article 11 of Regulations 44, as amended July 16, 1932, by T. D. 4339 XI-2 Cum. Bull. 446, less than a month after the original regulation on lubricating oils to which petitioner refers was promulgated. A ruling issued in 1932, S. T. 505, XI-2 Cum. Bull. 448 (Appendix, *infra*, pp. 12-13), holds specifically that cutting oils and water soluble oils used in cutting and machining operations on metals are taxable as

lubricating oils. This contemporary administrative construction of the statute is entitled to great weight in determining the meaning of the statutory language (*Brewster v. Gage*, 280 U. S. 327; *McCaughn v. Hershey Chocolate Co.*, 283 U. S. 488). This ruling has been followed consistently since it was made. There is thus no merit to the petitioner's contention that administrative construction of the statute has not been uniform and is not entitled to any consideration.

Neither the regulation nor the ruling is in conflict with the statute. As petitioner points out (Pet. 11-12), statutory language should be given its plain and ordinary meaning (*Lynch v. Alworth-Stephens Co.*, 267 U. S. 364). A dictionary definition (R. 28), which presumably states such meaning, describes "lubricant" as a substance possessing such properties that it will, when interposed between moving parts of machinery, make the surfaces slippery and reduce friction; it defines a cutting lubricant as a lubricant or cutting compound. The court below in its findings (R. 29) has described several types of lubrication, such as boundary or border lubrication, thin film lubrication, and extreme pressure lubrication. Surely the term "lubricating oils," as used in the statute, would, in normal usage, include oils used for all these various types of lubrication and would not be confined, as petitioner contends (Pet.

8, 11), merely to oils used in automobile engines or lawn-mowers.<sup>2</sup>

There can be little question but that the oils manufactured and sold by the petitioner were in fact used for lubrication. The court below found (R. 33):

The substances, the taxes on which are here in question, were oils. As used, one of their principal purposes was to prevent friction or adhesion between the surfaces of metal cutting tools on the one hand and the pieces of metal which are being cut by those tools, and the chips or shavings which are cut from those pieces, on the other. This prevention was lubrication and the oils used to accomplish it were lubricating oils.

This finding is fully supported by the other evidentiary findings to which petitioner raises no objection. Petitioner's contention that the lubricating function is not in any respect "sufficient quantitatively to warrant taxability" (Pet. 13) is without merit. The court below found that one of the primary functions of cutting oils is to serve as an antiweld or antiseizure substance whereby friction is reduced between the workpiece and the

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<sup>2</sup> H. Rep. No. 708, 72d Cong., 1st Sess., p. 34 (1939-1 Cum. Bull. (Part 2) 457) does not suggest that Congress intended to limit the tax to such oils. The bill in the form in which it was introduced into the House provided for a tax on lubricating oils of certain grades (see S. Rep. No. 665, 72d Cong., 1st Sess., p. 43 (1939-1 Cum. Bull. (Part 2) 496), and the statement in H. Rep. No. 708 refers to that bill.

tool, and the chip and the tool. Such a function, as fully described in the findings, constitutes lubrication, and is known in the lubrication field as "extreme pressure lubrication." Since this is one of the important functions of cutting oils, the court's holding that these oils are lubricating oils is clearly correct.

CONCLUSION

There is no conflict and the decision below is correct. Therefore the petition should be denied.

Respectfully submitted.

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## APPENDIX

Revenue Act of 1932, c. 209, 47 Stat. 169:

### SEC. 601. EXCISE TAXES ON CERTAIN ARTICLES.

\* \* \* \* \*

(c) There is hereby imposed upon the following articles sold in the United States by the manufacturer or producer, or imported into the United States, a tax at the rates hereinafter set forth, to be paid by the manufacturer, producer, or importer:

(1) Lubricating oils, 4 cents a gallon; but the tax on the articles described in this paragraph shall not apply with respect to the importation of such articles.

\* \* \* \* \*

Act of June 16, 1933, c. 96, 48 Stat. 254 (Gasoline Tax Amendment):

\* \* \* \* \*

SEC. 4 (b) Effective fifteen days after the date of the enactment of this Act, section 601 (c) (1) of the Revenue Act of 1932 is amended by adding at the end thereof the following:

“Under regulations prescribed by the Commissioner with the approval of the Secretary, no tax shall be imposed under this section upon lubricating oils sold to a manufacturer or producer of lubricating oils for resale by him, but for the purposes of this title such vendee shall be considered the manufacturer or producer of such lubricating oils.”

\* \* \* \* \*

Revenue Act of 1934, c. 277, 48 Stat. 680:

SEC. 603. TAXES ON LUBRICATING OIL AND GASOLINE.

(a) Section 601 (c) (1) of the Revenue Act of 1932, as amended, is amended by adding after the first sentence thereof the following: "Every person liable for tax under this paragraph shall register and file bond as provided in section 617, as amended."

\* \* \* \* \*

Treasury Regulations 44 (Revised September 1934):

ART. 40. *Use of terms.*—The term "lubricating oil" as used in these regulations includes all oils, regardless of their origin, which are sold as lubricating oils and all oils which are sold or used for lubrication.

The term "lubricating oils" does not include products of the type commonly known as grease. Oleaginous substances which are classed as grease are not subject to the tax when (1) of a worked consistency of less than 390 penetration units, or an unworked consistency of less than 360 penetration units, by the method of test of the American Society for Testing Materials D-217-33-T and (2) free from oil, or composed of oil and a soap or soaps, or of a mixture of soaps and other substances.

The term "manufacturer" includes (1) any person who produces lubricating oil by any process of manufacturing, refining, or compounding, or any manipulation involving substantially more than mere mixing of taxable oils, (2) any person who

produces lubricating oil by mixing taxable oils with other substances to produce lubricating oils, and (3) any person who cleans, renovates, or refines used or waste lubricating oil by any method or process which produces an oil substantially equivalent to new lubricating oil.

The term "manufacturer" does not include a person who merely blends or mixes two or more taxable lubricating oils.

ART. 41. *Scope of tax.*—The tax attaches to the sale by the manufacturer of lubricating oil. However, no tax attaches to the sale of lubricating oil by the importer thereof. Lubricating oils imported into the United States are subject to a tax of 4 cents a gallon under section 601 (c) (4), upon the importation thereof. This tax is administered by the Bureau of Customs of the Treasury Department.

All manufacturers of lubricating oils must register and give bond in accordance with the provisions of articles 8 and 9.

S. T. 505, XI-2 Cumulative Bulletin 448 (1932):

REGULATIONS 44, ARTICLE 11: SCOPE OF TAX.

*Cutting oils and water soluble oils used for lubricating purposes held taxable.*

Advice is requested whether cutting oils and water soluble oils are lubricating oils and subject to the tax under section 601 (c) 1 of the Revenue Act of 1932.

Under Treasury Decision 4339, issued July 16, 1942 [see on page 446], any oil having both lubricating and nonlubricating uses is taxable when sold or used for lubrication.

Cutting oils and water soluble oils, used in cutting and machining operations on metals, are used for lubricating purposes and are therefore held to be taxable under section 601 (c) 1 of the Revenue Act of 1932, when sold by the manufacturer or producer.